



FEBRUARY 3, 2016

## Specific implement in Scots Law

A range of issues arise from the facts of *Kier Construction Ltd v WM Saunders Partnership LLP*. However, the main point to note is that the Scottish courts are willing to order specific implement (*specific performance*) to compel a party to a contract to provide an executed collateral warranty that they were contractually obliged to give.



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### Specific implement

Specific implement in Scotland is the equivalent of specific performance in England and Wales. It requires the court to grant an order requiring a party to perform a specific act. (In England, specific performance is an equitable remedy available for breach of contract and may be granted in addition to or instead of damages.)

### Kier Construction Ltd v WM Saunders Partnership LLP

The circumstances of this case are as follows:

- In 2006, Dumfries & Galloway Council sought tenders for the construction of a new leisure centre in Dumfries.
- Kier Construction Ltd was appointed as the principle contractor. Under the main contract, Kier undertook to produce a *collateral warranty* in favour of the Council from all the design consultants and sub-contractors it employed on the project.
- Kier appointed WM Saunders Partnership LLP (WMSP) as a consultant. Under its *professional appointment*, WMSP was responsible for providing the services of architect, civil engineer and structural engineer. As part of the appointment, WMSP also undertook to provide a signed collateral warranty in favour of the Council within 14 days of a formal request from Kier.
- The leisure centre was completed in May 2008.

### Council's claim against Kier

Following completion of the leisure centre, the Council discovered a number of defects in the building and the centre was closed while remedial works were carried out. The Council then raised proceedings against Kier claiming £5.6 million in damages for breach of contract.

### The collateral warranty

The judgment does not explain why Kier did not formally ask WMSP for a collateral warranty until 28 January 2015. However, a style warranty had been appended to WMSP's appointment. This replicated the style warranty in the main contract. The style warranty contained certain blanks that had to be completed, relating to a *net contribution clause* and the level of *professional indemnity insurance* required.

When Kier sent the draft warranty to WMSP in January 2015, it requested that it was signed and returned in terms of the appointment. In the draft warranty, Kier had completed the blanks (including inserting a figure of £5 million in respect of professional indemnity insurance).

Initially WMSP refused to sign the warranty but, on 13 March 2015, it stated that it would sign if Kier paid its outstanding fees (some £36,000). On 19 March 2015, Kier confirmed its agreement to WMSP's proposal. On 29 April 2015, a cheque was sent to WMSP in terms of the agreement to pay WMSP's outstanding fees in return for the signed collateral warranty. However, WMSP did not deliver the signed warranty and, in early August 2015, it returned the cheque.

### **Specific implement proceedings**

In light of WMSP's failing to deliver the signed warranty, Kier raised proceedings for specific implement, seeking from WMSP a signed warranty with the blanks completed as in the draft of January 2015.

The matter came before Lord Woolman, who found that an agreement had been formed on the basis of the parties' 13 and 19 March 2015 correspondence. In particular, the parties had agreed that the content of the collateral warranty should be as per the draft. Kier then attempted to give effect to the bargain by sending a cheque to WMSP.

### **Lord Woolman's observations**

As the court held that a binding agreement had been formed in March 2015, there was no need for it to provide an opinion on whether WMSP was obliged under the original appointment to provide a signed collateral warranty. However, Lord Woolman made several observations:

- The use of the word "shall" in the appointment made clear that WMSP had an obligation to provide a warranty.
- The obligation to provide a warranty was a stand-alone requirement.
- There would need to be very clear language in a document before a court would be prepared to infer that a party had waived its right to specific implement.
- Leaving blanks in the draft warranty was a technical mistake by Kier. However, the court would be slow to hold that such an error defeated Kier's rights.

In contrast, in *Liberty Mercian Ltd v Cuddy Civil Engineering Ltd*, the Technology and Construction Court (TCC) considered an application for specific performance to require the defendant to fulfil its contractual obligations to provide a *performance bond* and collateral warranties to the claimant. The court considered whether damages would be an adequate remedy, whether performance would be possible and the extent of supervision required by the court. The court did not consider how the fact that CCEL did not have a parent company affected its obligation to provide a *parent company guarantee*. It held that damages were not an adequate remedy for the non-provision of the other security documentation.

### **Conclusion**

In Scots law, a party is entitled to an order compelling performance (specific implement), although there are occasions where specific implement will be refused. Examples include:

- Contracts that depend on a highly personal relationship (such as partnership or employment).
- Circumstances in which performance has become impossible, or where performance could reasonably be obtained from another source.

There is a residual discretion to refuse specific implement, but that will be exercised only in exceptional cases. Therefore, in Scotland the innocent party is able to choose, as of right, between damages and specific implement.

English law begins from the opposite standpoint. Although damages are available as of right, specific performance was historically available only where damages were an inadequate remedy. It seems that the law is more liberal now, and will grant specific performance in a broader range of cases than before.

Therefore, the practical outcome in Scottish and English cases will be the same on many, but not all, occasions. Sometimes the differences in positions of the two legal systems will produce opposite results.